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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK KEITH BURGETT,

Defendant and Appellant.

A125347

(Solano County  
Super. Ct. No. FCR234705)

This is an appeal from judgment following defendant Derek Keith Burgett's admission of a probation violation and the trial court's subsequent reinstatement of probation with modifications, including a requirement that he serve an additional 90 days in county jail.

After defendant filed a timely notice of appeal, appellate counsel was appointed to represent him. Appointed counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*People v. Wende*), in which she raises no issue for appeal and asks this court for an independent review of the record. (See also *People v. Kelly* (2006) 40 Cal.4th 106, 124 (*People v. Kelly*).) In addition, counsel asks that we stay this case until the Superior Court's Appellate Division (Appellate Division) issues a final decision in a related misdemeanor case brought against defendant. Counsel attests that defendant was advised of his right to file a supplemental brief in a timely manner, but he has not exercised such right.

We have examined the entire record in accordance with *People v. Wende* and *People v. Kelly*. For reasons set forth below, we agree with counsel that no arguable

issue exists on appeal. Further, we find that a stay in this matter pending a final decision by the Appellate Division in the related misdemeanor case is unnecessary. Accordingly, we affirm the judgment and decline counsel's stay request.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On July 25, 2006, a felony complaint was filed against defendant in Solano County Superior Court. The complaint stemmed from events occurring on July 22, 2006. Defendant and his wife, J.B., were returning from a bar after having consumed several alcoholic beverages when they began to argue over cigarettes. During this argument, defendant hit J.B. in the face with the back of his hand. Once home, the argument escalated, at which time H.E., the 12-year-old daughter of J.B. from a previous marriage, became involved. Defendant used a wooden pole in a threatening manner toward H.E. when she attempted to call the police. When J.B. intervened in defendant's confrontation with H.E., defendant struck J.B. with the wooden pole. Police subsequently arrived at the residence and found defendant aggressive and intoxicated. Defendant was subsequently charged with violations of Penal Code section 273.5, subdivision (a)<sup>1</sup>, felony corporal injury to spouse/cohabitant/child's parent (count one); section 245, subdivision (a)(1), assault with a deadly weapon or by force likely to produce great bodily injury (counts two and three); and section 136.1, subdivision (a)(1), dissuading a witness from testifying (count four).

On September 5, 2006, defendant pleaded no contest to count one, felony corporal injury to spouse/cohabitant/child's parent, and the remaining charges were dismissed. On October 3, 2006, the trial court suspended imposition of a prison sentence and placed defendant on formal probation for a 3-year period, subject to certain terms and conditions, including serving 90 days in county jail and completely abstaining from use of alcohol.

On February 5, 2008, defendant admitted violating the terms of his probation by failing to abstain from use of alcohol and to obey all laws. Defendant's probation was

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<sup>1</sup> Unless otherwise stated, all statutory violations herein are to the Penal Code.

thereafter revoked and reinstated with modifications, including with a requirement that he serve an additional fifteen days in county jail. The term of probation requiring defendant's total abstinence from use of alcohol remained in force.

On March 6, 2009, defendant admitted another probation violation for failing to abstain from use of alcohol after he was arrested for public drunkenness. Defendant's probation was reinstated and extended with certain modifications. The probation term requiring his total abstinence from use of alcohol remained in force.

On April 26, 2009, defendant was arrested for yet another alcohol-related offense. A Suisun City police officer made a traffic stop after observing defendant's vehicle weaving in its lane and then abruptly change lanes before making a turn. During the traffic stop, the officer smelled a strong alcohol odor and noticed defendant's eyes were watery and red and his speech was slow and slurred. Defendant thereafter admitted that he had consumed a few drinks and was on probation for a domestic violence offense.

As a result of his April 26, 2009 arrest, misdemeanor charges were brought against defendant in a separate case, Case No. FCR265946. In this misdemeanor case, defendant filed a motion to suppress evidence seized during the traffic stop on the ground that the officer did not observe any actual violation of the Vehicle Code. The trial court denied his motion, as well as a subsequent motion for reconsideration. Defendant thereafter pleaded no contest to one misdemeanor count of driving under the influence of alcohol (DUI) in violation of Vehicle Code section 23152, subdivision (a). When this plea was entered, defendant was represented by counsel and acknowledged in writing that he had knowingly, intelligently and voluntarily waived certain rights, including his right to a jury trial and to confront witnesses. The order denying defendant's motion to suppress in Case No. FCR265946 is currently on appeal in the Appellate Division, and is scheduled to be heard August 24, 2010.

Meanwhile, in this case, defendant was found to have committed another probation violation for failing to abstain from alcohol use based upon his misdemeanor DUI conviction in Case No. FCR 265946. The trial court again reinstated and modified defendant's probation to include service of an additional 90 days in county jail.

On June 29, 2009, defendant filed a notice of appeal in this case, identifying the basis for appeal as “the denial of a motion to suppress evidence under Penal Code section 1538.5.”

### **DISCUSSION**

Neither appointed counsel nor defendant has identified any issue for our review. Upon our own independent review of the entire record, we agree none exists. (*People v. Wende, supra*, 25 Cal.3d 436.) The trial court found that defendant violated the terms of his probation by failing to abstain from alcohol use – his third such violation – based upon evidence that he admitted committing the misdemeanor DUI offense. At all relevant times during these proceedings, defendant was represented by competent counsel. While defendant is challenging admission of the evidence obtained during his misdemeanor DUI arrest in the pending appeal of Case No. FCR265946 in the Appellate Division, “illegally obtained evidence may be considered in determining whether to revoke probation, as long as the illegality was not egregious.” (*People v. Harrison* (1988) 199 Cal.App.3d 803, 808.) We are aware of no allegation in Case No. FCR265946 of egregious illegality. Under these circumstances, we believe the trial court’s decision to reinstate probation with modifications, including the requirement of serving 90 additional days in county jail, was lawful. (Cal. Rules of Court, rule 4.435, Pen. Code, §§ 1203, 1203.2, 1203.3.)

Moreover, we conclude, for the following reasons, that there is no need to stay this matter pending a final decision by the Appellate Division in Case No. FCR265946. On February 23, 2010, defendant filed a request seeking a fifth extension of time for filing his opening brief in this appeal in light of the pending misdemeanor appeal in Case No. FCR265946. This court, indicating that defendant was “in effect, seek[ing] a stay of this appeal” pending resolution of the misdemeanor appeal, asked the People to respond. On March 18, 2010, the People filed an opposition to defendant’s extension request, arguing that “any challenge to the traffic stop predicated the misdemeanor DUI charge must be raised in the appeal of that conviction . . . [which] is currently going forward in the superior court.” We agree.

There can be no dispute that, under the applicable rules of court, the Appellate Division is the appropriate tribunal for deciding defendant's appeal of the order denying his motion to suppress evidence related to his arrest for a misdemeanor DUI offense. (Cal. Rules of Court, rule 8.850 et seq.) Moreover, even if defendant ultimately obtains reversal of that order from the Appellate Division, the trial court in this matter retains jurisdiction over defendant's probation and "ha[s] authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." (Pen. Code, § 1203.3. See also Cal. Rules of Court, rule 4.435.) As such, little, if anything, would be achieved were this court to delay this matter yet again.

Thus, having ensured defendant received adequate and effective appellate review in this appeal, we deny his request for stay and affirm the trial court's judgment. (*People v. Kelly*, *supra*, 40 Cal.4th at pp. 112-113.)

#### **DISPOSITION**

The request for stay is denied and the judgment is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.